

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATIONS Nos 8917, 8918 & 8920 of 1998

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

JADAV BHARAT M

Versus

ADDITIONAL CHIEF SECRETARY

Appearance:

1. Special Civil Application No. 8917, 8918 & 8920 of 1998
MR BS PATEL for Petitioner No. 1
MRS RANJAN B PATEL for Petitioner No. 1
MR PRADIP D BHATE A.G.P. for Respondent No. 1-4
RULE SERVED for Respondent No. 5-6
-

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 17/02/2004

ORAL COMMON JUDGEMENT

In this group of three petitions, the facts are

identical and so are the issues involved, hence, they are heard together and now they are being disposed of by this common judgment.

2. The petitioner of Special Civil Application No.

8917 of 1998 was appointed as part time Hamal-cum-Safai Kamdar i.e. Sweeper-cum-Water Server by order dated 3rd March, 1992. His appointment was made on the terms and conditions contained in the said order. One of them being that he would be required to render service for 7 hours daily. The said appointment was made by respondent no. 4. By letter dated 31st March, 1994, he was terminated with effect from the same date. Again, he was appointed in the year 1994-1995 as Sweeper on temporary basis on the wages made payable for a daily wager rendering more than six hours service. It was made subject to the conditions contained in the said order. One of them being that he would be required to render for more than 6 hours service daily. Vide order dated 9th October, 1995, the petitioner was appointed for the year 1995-1996 as Hamal-cum-day & night watchman with retrospective effect from 1st April, 1995 to 31st March, 1996. In this order also, it was specified that he should render more than 6 hours service daily. Vide order dated 4th May, 1996, the petitioner was appointed as part timer as water server for 1 hour and as Sweeper for 2 hours daily for the year 1996-1997. The hours of duty were reduced on account of measure of economy taken by the Government as can be seen from the said order. Respondent no. 4 issued a certificate dated 21st November, 1996, certifying that the petitioner had been working in the said Central Reserve Library at Mahesana as Hamal-cum-Sweeper-cum-Water server as part timer during the period between 6th March, 1992 to 20th November, 1996 and that he had been rendering service daily for more than 6 hours. It was also certified that the petitioner was serving honestly, sincerely and diligently. Vide communication dated 19th November, 1996, he was also summoned to remain present for personal interview before the Departmental Selection Committee for being considered for promotion from part timer in Class-IV in accordance with recommendation received from the petitioner's department. He was asked to remain present with necessary documents. It appears that thereafter, things remained just as they were and the petitioner was not intimated what was the outcome of this interview. The petitioner has now approached this court with a prayer that they should be made permanent in the employment by virtue of the Circular dated 26th December, 1980, issued by the Finance Department of the Government of Gujarat in respect of the employees who were working

on part time basis. Vide the said Circular, Heads of all the Departments were requested that in the event of part timer rendering service for three continuous years, the Heads of the Departments on all the permanent posts under them should absorb the employees working on part time basis in accordance with the Recruitment Rules and procedure. When the permanent posts are filled up, new recruitment should be made on the vacant part timer's post.

3. Mr.B.S. Patel learned advocate appearing for the petitioner in all the petitions has stated that the facts in this petition are more or less identical, except for some minor difference in the dates of appointment. He has further stated that all the petitioners' are rendering three or more than three years service on part time basis with the respondents. I am, therefore, not narrating the facts of the other petitions in detail herein.

3.1. It is submitted by Mr. Patel that the petitioners who had been serving faithfully and diligently with the respondents for over three years as part timers, ought to have been absorbed on the permanent posts in Class-IV by virtue of the aforesaid Circular. He has further submitted that since that has not been done, the petitioners are constrained to approach this Court by way of this petition. In support of his contention, he has placed reliance on the decision of this Court rendered in different matters, details of which will be referred to in the due course of the judgment.

3.2. As against that, Mr.Pradip D. Bhate learned A.G.P. has submitted that the reliance placed by the petitioners on the circular dated 26th December, 1980, is not proper because, the said Circular now stands superceded by another Circular which has been issued in the wake of economy measure taken by the State Government. By virtue of that Circular, the earlier Circular of 1980 has been stayed. He has further submitted that the appointment of petitioners in Class-IV was purely on temporary basis and they did not get any substantive right of being appointed on the permanent post in Class-IV. He, therefore, submitted that the petitions be dismissed.

4. Having carefully gone through the record of this petition including the affidavit-in-reply filed by the respondents and having considered the submissions of the rival parties, it clearly appears that the petitioners

were appointed as part time employees in Class-IV by following proper procedure namely, that their names were received from the employment exchange and they were appointed after interview. It also appears that they have been rendering service for over three years. It is also clear that at no point of time, any adverse observation was made against them vis-a-vis the service rendered by them. It also appears that they were required to render more than 6 hours service atleast for three years and thereafter the working hours were reduced for curtailing expenditure. It also appears that the Department of Finance of the State Government itself issued Circular in the month of December, 1980 requiring Heads of the Departments to absorb the part timer employees who had been working in Class-IV to be made permanent upon the availability of the permanent post. In light of the aforesaid, the controversy is narrow and there is no doubt in my mind that the petitioners would be squarely covered by the aforesaid Circular and they would be entitled to be considered for absorption in the permanent post. It is the grievance of the petitioners that despite several posts being available, no absorption was being made by the respondents and the fate of petitioners had remained undecided. It appears that the petitioners are not being made permanent or absorbed on such post in Class-IV by the respondents because Circular dated 21st August, 1995 again by the Finance Department of the Government of Gujarat, whereby the Heads of the Departments, it was intimated that with a view to curtail expenditure, the said Circular was required to be kept in abeyance. Though this Circular is not annexed, in the affidavit-in-reply filed by the State Government, Mr. Bhate the learned A.G.P. has contended that such measure can form impediment in the way of the petitioners for being absorbed on permanent basis in the employment. At this juncture, it is necessary to refer to the decision cited by Mr. Patel to substantiate the case of the petitioner. He has first placed reliance on the decision rendered by the learned Single Judge of this Court (Coram : Kundan Singh, J.) rendered in Special Civil Application No. 1209 of 1994 dated 20th July, 1998. In the case before the learned Single Judge, he was required to consider this very Circular i.e. Circular dated 26th December, 1980. By placing reliance on the said Circular, this Court held that any Class-IV employee who had worked continuously for three or more than three years is required to be absorbed. The learned Single Judge has observed as under:-

"In the case on hand, it is the respondents who have not filed any affidavit-in-reply. There is

nothing on record to show that there was no vacancy of full time sweeper in the cadre of Class-IV employee for absorption or regularisation/ It is also not disputed that the petitioner is still working as part time sweeper continuously for a period of 15 years. As such, as per Circulars, the petitioner ought to have been absorbed in the cadre of Class-IV employee, much before the filing of this writ petition. In the facts and circumstances of the case, the petitioner is entitled to be absorbed and regularized as full time sweeper in the regular cadre of Class-IV employee, without considering any technical objection regarding age or requisite qualifications with retrospective effect from the date of the filing of this petition."

4.1. However, the learned Judge came to such decision in absence of affidavit-in-reply of the other side and without referring to the Circular dated 26th December, 1980.

4.2. This Circular came under direct scrutiny of the learned Single Judge of this Court (Coram : S.K. Keshote, J.) in the decision rendered in the case of Kirtikumar S. Thakore v. Director dated 20th April, 1999 rendered in Special Civil Application No. 7156 of 1997, the learned Single Judge had occasion to consider and deal with the identical submission which was advanced on the basis of the economy measure adopted by the Government. The learned Judge was required to consider the identical issue relating to Peons, Sweepers, Chowkidars Cooks etc., to be regularized on permanent post in Class-IV has held as under :-

6. "It is true that the State of Gujarat may put ban on the appointments or it may make economy in its expenditure, but it can be only for bonafide reasons, purpose and object. Here in the present case, if we go by the facts, if it is the matter of economy in expenditure then no appointment could have been made. The select list has been prepared and the persons who have been selected were given the job. They are rendering their services to the respondents but they have been paid only daily wages. It is not the case where the petitioners are not discharging the same duties which are to be discharged by the Class-IV employees for full time but the respondents are taking the full time work from them but so far as

the payment of full salary is concerned or the claim of the petitioners for regularization is concerned, the respondents, the officers of a Welfare State take the shield of this economy in expenditure. This approach of the respondents is certainly contrary to the provisions of Articles 14, 21 and 39 of the Constitution. The decision on which reliance has been placed by the learned counsel for the respondents is of little help. It is a deliberate creation which has been made by the respondents with clear object to the deny the petitioners who are duly selected for the Class-IV post, the full salary of the post. The petitioners No.1, 2, 3, 4, 7 and 8 are duly selected and in their cases, no exception can be taken because they are entitled for all the benefits. Merely because they are being paid from the contingency fund, is of no consequence. The object and purpose and more so where it is oblique purpose are to be accordingly considered. So far as the petitioners No.3, 6 and 9 are concerned, their case stand on different footing as their names does not appear in the select list. This is the rarest of rare case where thee daily wage appointments were made from the select list prepared of the candidates.

The learned Judge has further observed as under:-

7. "For all those years, these persons are working and the respondents are taking work from them which goes to show that the respondents are in need of regular employees but they are taking the benefit of this theory of economy in expenditure for last more than six years which has to be now discouraged and discontinued. Otherwise the exploitation of these low paid employees at the hands of none other than the officers of the Welfare State will continue. It is equally the duty of the Court to see that the respondents, the officers of the Welfare State may not be allowed to act contrary to Articles 14, 21 and 39 of the Constitution.

5. It is, therefore, clear that the view taken by the learned Judge was that in such event, part time employees ought to have been absorbed on the permanent post in Class-IV. Plea of the Government regarding curtailment in the expenditure was not accepted. According to the learned Judge, there was no valid and

justifying reason denying such opportunity to the concerned employees. I am totally in agreement with the view taken by the learned Single Judge in this case. When the Circular is clear and when the requirements have been fulfilled by the concerned employees, it ought to have been considered for being absorbed on the vacant permanent post in Class-IV. According to the petitioners, despite number of such posts having vacant, the claim of the petitioners is being ignored and they are not being appointed or absorbed on permanent post. As against that, the affidavit-in-reply filed by the respondents show that no such post is available. However, that was the position about couple of years back. When the petitioners have been rendering service as part timer for all these years, even otherwise, also, their service were required to be regularized. As held by the Apex Court time and again, the employee cannot be continued for long time on temporary basis even by giving artificial breaks in the continuity of service. In the present case, it appears that even when there was some break, it was filled up by subsequent order giving retrospective effect to the appointment. Thus, when the petitioners have rendered continuous service for more than three years and when they have been even on that post appointed in accordance with the said procedure, and if they have been working there, discharging their duties sincerely and honestly, there is no earthly reason for the respondents not to absorb them on the permanent post in Class-IV.

The respondents are, therefore, now required to be directed that irrespective of the Circular of 21st August, 1995, they shall consider the case of each petitioner for appointment on permanent post in Class-IV and if the permanent posts are found vacant, they shall be appointed on the same in accordance with their claim, in the matter of seniority and concerned Regulations and if otherwise, they are not ineligible. Appointment should not be denied on the ground of overage or on the ground that it may amount to giving a back-door entry. This exercise to be carried out as early as possible but in any case not later than 30th May, 2004. If need be, the petitioner can make appropriate representation, which will be considered in light of this judgment and in particular, the direction given therein.

The result is that these petitions are partly allowed. Rule is made absolute to the aforesaid extent with no order as to costs.

[AKSHAY H. MEHTA, J.]

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